

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

RE: COMPETITIVE MARKET INITIATIVES

DTE 01-54

**Reply Comments of the Massachusetts Union of Public Housing Tenants
and
National Consumer Law Center¹
January 14, 2002**

I. Introduction

The National Consumer Law Center (“NCLC”), on behalf of the Massachusetts Union of Public Housing Tenants (“MUPHT”), appreciates the opportunity that the Department has offered parties to comment on the Phase II issues included in the December 11, 2001 Memorandum in this case. The Department now has before it a diverse range of views and information that will help inform its decision. NCLC/MUPHT offer this reply to comments submitted by other parties on January 4, 2002.

II. Electronic Signatures

Few parties other than NCLC/MUPHT offered initial comments on the use of electronic signatures for enrolling or conducting business with customers who are interested in competitive supply. NSTAR (Comments, at 13) agrees with NCLC/MUPHT that the Department should “adopt generally the consumer protections listed in §7001(c) of the federal E-Sign Act,” emphasizing the requirement that the seller must provide an accessible means for consumers to save copies of the electronic documents. NSTAR suggests that the Department set up a working group to develop the methods to

¹ The Low-Income Energy Affordability Network (“LEAN”) joins in these comments. LEAN is the “low-income weatherization and fuel assistance program network” alluded to in G.L. c. 25, §19.

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implement use of electronic signatures. NSTAR's comments are completely consistent with

NCLC/MUPHT's.

The Competitive Suppliers (Comments, at 14) also address the use of electronic signatures. NCLC/MUPHT agrees with these Suppliers that a significant segment of consumers are interested in conducting business on the Internet, as NCLC/MUPHT itself noted in its August 10, 2001 comments (at 9). The Competitive Suppliers also suggest several useful requisites of an electronic signature program. In reply, NCLC/MUPHT suggests that the Competitive Suppliers conceptual proposal should be fleshed out through a working group that could develop a more detailed protocol that all competitive suppliers (not just those in the coalition called Competitive Suppliers) would have to follow. The Department should develop protocols not only for the initial enrollment of the customer onto competitive supply but also for future electronic transactions between the competitive suppliers and their customers. NCLC/MUPHT is particularly concerned about retention of notices, bills and accounting records sent electronically in a manner that would allow the customer or the Department itself to access those records or notices in the future, with certainty that the documents had not been altered and had actually been delivered to the customer at the appropriate time.² See 15 USC §7004(b)(3)(granting states the authority to develop rules regarding accuracy, record integrity, and accessibility of records).

² The Federal Communications Commission has formally adopted rules governing telecommunications companies that incorporate the provisions in the E-Sign Act, 15 USC §§7001 *et seq.* Those rules parallel the suggestions made by NCLC/MUPHT in their comments of January 4, 2002. The FCC also has placed the burden on the companies of disproving any subscriber's allegation questioning the authenticity of an electronic signature. 66 Fed. Reg. 12877, 12878 (Mar. 1, 2001).

In the admittedly somewhat different context of telephone deregulation, many consumers have a very difficult time determining and documenting the terms and conditions of their individual agreements with companies, particularly because the companies frequently change their prices and send notices only electronically. Often, the companies do not keep adequate records of the dates of all such changes and the customers to whom they apply. The serious extent of this problem has been well-documented in California³ and no doubt is prevalent elsewhere as most of the companies are national in scope. While this type of problem is not *per se* the result of electronic signatures or electronic billing, consumers will experience greater problems as electronic transactions replace paper transactions simply because there will be fewer paper records and more difficulty in proving which electronic documents govern the particular agreement between the customer and company. The Department should also keep in mind that the advent of electric restructuring has brought with it high turnover among licensed suppliers, with Essential.com and Enron going bankrupt and Utility.Com ceasing to do business. The Department cannot assume that companies in such a fluid environment will adequately maintain records in the absence of clear protocols. The Department should take the time now to develop adequate protocols for record retention and accessibility to avoid problems in the future.⁴

III. The Usource Proposal

Usource has submitted a proposal to allow it to provide energy brokering services to

³ "Consumer Protections for a Competitive Telecommunications Industry: Telecommunications Division Staff Report and Recommendations," California PUC (Feb. 3, 2000).

⁴ See NCLC/MUPHT's January 4, 2002 comments for references to existing Department and Attorney General regulations that require competitive suppliers to use paper documents for various transactions and notices.

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Massachusetts consumers. At the outset, Usource proposes that it would be the sole source of this service, although it expects local distribution companies to “facilitate customer education and customer enrollment on this system for a period of 24 months.” Comments, at 2. Usource suggests that at some later date “the program may be expanded to include other supplier-neutral technology-enabled brokerage services.” *Id.* Usource explicitly asks that the Department “sponsor a partnership between Usource and electric distribution companies.” *Id.*, at 3. Usource does not propose providing any services for residential customers for approximately the first 18 months of the program.

The Usource proposal reads like a business presentation to potential investors, but in this case Usource seeks not funding but the Department’s approval and support. The Department should not lend its support.

Usource seeks a Department-sanctioned franchise, at least in the near-term, for the provision of brokering services to selected Massachusetts consumers. Usource will engage in cream-skimming, focusing first on the very largest customers⁵ who other brokers or suppliers may wish to solicit directly. Usource’s proposal would impose expenses on distribution companies (and, therefore, the customers of those companies) by requiring those utilities to “prepare marketing plans and timetables subject to guidance from and approval by Usource in advance.” Comments, at 4. Usource will collect the revenues it needs from suppliers. Usource would require customers using its brokering services to commit in advance “to undertake a competitive market transaction for the specified number of years as

⁵ Usource proposes to focus on customers using 200,000 kWh or more per year, for the first six months of the program. During the next six months, Usource would include customers using 10,000 kWh per year or more.

long as the price is under the specified target price.” Comments, at 5.

The Usource proposal is the antithesis of the open and competitive markets that the Restructuring Act is designed to promote. It asks the Department to sanction a particular technological and marketing approach in response to the fact that few customers have chosen to enter the competitive market. It also asks the Department to lend its support to one particular company. It imposes unspecified costs on distribution companies and their customers. It offers no benefits to residential customers for a year and a half.

As Dominion Retail notes, competitive suppliers should be allowed to compete directly to serve customers. No individual company or method should be given an advantage over others. The Division of Energy Resources notes that the Usource proposal gives it an unfair advantage over other potential brokers, and also raises the concern that Usource will focus on larger customers. Usource certainly should be free to continue offering and expanding, if it can, its brokering services, but it should do so on a level playing field with all other parties.

IV. Direct Authorization to Switch/Assignment to Supplier

The Competitive Suppliers support a model followed by Consolidated Edison in New York. Under its “Ease of Enrollment Program,” ConEd asks customers who call in with high bill complaints whether they would like to switch to competitive supply. ConEd offers each customer only one supplier choice, on a random basis from a list of approved suppliers.

In deciding whether this model is at all applicable in Massachusetts, the Department should

keep in mind the context of New York restructuring and ConEd's specific situation. In New York, which does not have a restructuring statute, distribution companies took individual approaches under the auspices of that state's commission. Some companies, like New York State Electric and Gas, either retained some of their generating units or hedged against price volatility by entering long-term agreements. ConEd sold off its generation and exposed its customers to the swings of the spot market.⁶ As a result, prices shot up 43% in the summer of 2000 compared to the prior year, "despite the coolest July in 86 years."⁷ The ConEd direct authorization model operated in the context of unusual and extreme price increases, at a company which had not hedged against price volatility. Any analogy to the current situation of Massachusetts customers is strained.

Further, the ConEd model is fundamentally at odds with free choice and competition. Customers do not get the opportunity to choose among suppliers, after gaining information about prices and other terms; they simply get switched to a particular supplier chosen at random. The model also presents the risk that customers will assume, regardless of what they are told, that the Department believes that the particular supplier is a good (or even the best) choice among available suppliers. This of course is not the case. A model like ConEd's will inevitably result in customers being assigned to suppliers who charge prices higher than others or who later cease doing business. The Department should not become so enmeshed in the process of customers choosing competitive suppliers. As some of the suppliers have already noted in their initial comments, it is up to the suppliers themselves to

⁶ See "Disconnected Policymakers" in *The Electricity Journal*, Vol. 14, No. 7 (Aug./Sept. 2001).

⁷ "Con Ed Bills Spike 43%," *N.Y. Daily News* (Aug. 2, 2000).

develop their own marketing techniques and to succeed or fail on the strength of the prices and services they have to offer.⁸ The ConEd model inevitably will direct market share to suppliers who would garner fewer customers in a truly competitive market, given that customers do not choose a particular supplier after evaluating price, terms and reputation. The Department should not adopt this model.

V. Mandatory Assignment

The Competitive Suppliers point to the purportedly “successful” model of assignment in Georgia. Under that model, all gas⁹ customers who had not chosen a supplier by a date certain were involuntarily assigned to suppliers. It is hard to ascertain how this program can be considered a success. Gas restructuring in Georgia has produced little but angry customers and negative press. As one commentator noted, at least one of the major suppliers “went out of business before we could even light the Weber,” yet then sent a bill seeking payment of \$88. Consumers complained of higher minimum monthly charges, the inability to reach customer service at the competitive suppliers for days on end, and not being able to get service at a new address turned on. “Deregulation: It’s not a gas!,” *Atlanta Journal Constitution* (Apr. 10, 2000). Marketers have admitted to price overcharges and repeated billing problems (“Gas marketer admits overcharges,” *Atlanta Journal Constitution* (Feb. 1, 2001)) and have been repeatedly charged with slamming (“Georgia Commission Tightens Regulation of

⁸ Select, for example, “strongly supports a competitive, market-based approach that encourages direct interaction between customers and competitive suppliers.” Comments, at 1. Dominion offered similar comments.

⁹ The Competitive Suppliers do not state whether they are referring to assignment of gas or electric customers, but NCLC/MUPHT are unaware of any such program for electric customers in Georgia.

Natural Gas Utilities,” *Atlanta Journal Constitution* (Jan. 15, 2000)).¹⁰ Georgia gas restructuring was battered by sharp increases in natural gas prices that buffeted consumers across the country, and much of the anger can be traced to these price increases, but there is little in the Georgia experience to recommend involuntary assignment of customers. In a competitive market, suppliers and marketers should obtain customers by convincing them of the value they have to offer in terms of prices, terms, and customer service. These companies should not be able to benefit both from minimal regulation and extraordinary government intervention that assigns customers to them on an involuntary basis.

VI. Conclusion

NCLC/MUPHT thank the Department for this opportunity to reply comments.

Respectfully submitted,

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¹⁰ This story reports that the commission had received over 2,500 slamming complaints.